No. 17426

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

DANIEL ROY PEREZ,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Appeal From
The United States District Court For the
Southern District of California
Central Division

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UNITED STATES OF AMERICA,

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APPELLANT'S OPENING BRIEF

This appeal is made by Daniel Roy Perez from a judgment rendered against him under the date of March 27, 1961 by the Honorable Ernest A. Tolin, Judge Presiding in the United States District Court, Southern District of California, Central Division, in proceedings under the Juvenile Delinquency Act, 18 USC 5032, and from the denial of his motion for new trial. The trial court found that on or about August 21, 1959, the Defendant did commit the offense of juvenile delinquency, in that he, with

intent to defraud the United States, uttered and published as true a United States Treasury Check, in the amount of $72.00, bearing the purported endorsement of the payees, Porfirio and Marceline Andrade, which endorsement was forged, as the Defendant then and there well knew, in violation of Title 18, United States Code, Section 495 (R.T. p. 64, line 16). The court ordered that the defendant be placed on probation until he should reach the age of twenty-one years. Motion for new trial was made by the Defendant and a hearing was held on April 10, 1961 in the courtroom of the Honorable Ernest A. Tolin. The motion was denied. This appeal has been seasonably taken from that denial and the judgment referred to therein.

I

FACTUAL BACKGROUND OF THE CASE

The government contended that on August 21, 1959, the Defendant, Mr. Daniel Perez, appeared at the Belvedere Park Grocery store and presented the United States Treasury check to the owner of the store, Mr. Primo Lira, for payment. It was contended that a conversation followed in which the Defendant advised Mr. Lira that the payee of the check was his uncle; that it was endorsed by his uncle, and that the check had been given to the defendant in order to cash for him (R.T. p. 24, line 5). The check was subsequently negotiated at the Belvedere Park Grocery to the owner, Mr. Primo Lira (R.T. p. 15, line 7).

the day the check was cashed, and that Mr. Perez had been in the store on that day (R. T. p. 43, line 17). Mr. Kenneth B. Thompson, a special agent with the United States Secret Service, who was conducting the investigation of the case, testified that, on the occasion of his first interview with young Perez, he asked the defendant if he had ever been in the Belvedere Park Grocery and defendant denied that he had (R. T. p. 9, line 5). Mr. Thompson testified that later, when he was taking the defendant to the market, the defendant stated that he had been to the market many times (R. T. p. 11, line 6). It is noted that defendant explained that apparent discrepancy by testifying that Mr. Thompson had confused him by misstating the address of the market in question (R. T. p. 57, line 7), an explanation which was tacitly acknowledged by witness Thompson, where he stated, as a part of his recount of taking the defendant to the market, that, " . . . I was a little mixed up as to streets".

On this latter point, the defendant testified that on the first occasion, Mr. Thompson had identified the market as the Belvedere Park Grocery on Brooklyn and Brannick (R. T. p. 57, line 7), and that he knew the market as Primo Lira's market on Fisher Street (R. T. p. 57, line 18). He further testified that when Mr. Thompson later said that Mr. Lira was the proprietor of the Belvedere Park Grocery (R. T. p. 57, line 18), he recognized the market and made it known to Mr. Thompson that he had been in the market on a number of occasions (R. T. p. 11, line 12).

Neither the testimony of the witness Thompson, nor the testimony of the witness Chavez was held by the Honorable trial court Judge to be a substantial factor in its decision (R. T. p. 63, line 18; p. 64, line 9). The court indicated that the case presented by the plaintiff had only two vital points. (1) The "positive identification by the witness Lira of this defendant having uttered the check" (R. T. p. 63, line 19); and, (2) the "rather striking evidence of a form of flight by the defendant" (R. T. p. 64, line 11). The form of flight referred to by the court is related in the testimony of Mr. Lira that the defendant never returned to the store after the time that he was said to have uttered the check, despite the fact that he was said to have made two or three visits a week to the store prior to this time (R. T. p. 17, line 13).

At the trial proper, the bare testimony of Mr. Lira on the first point is disputed only by the uncollaborated testimony of the defendant. The uncollaborated testimony of Mr. Lira on the second point was not disputed as such in the record. The ultimate issue of the trial then, was held to rest on the credibility of the witness Mr. Primo Lira versus that of the defendant, Mr. Daniel Perez. The court resolved this issue in favor of Mr. Primo Lira, noting in the record the evidence of what the court called "flight" as being of significance in arriving at that decision.

II

EVIDENCE WAS SUBMITTED IN CONNECTION WITH THE MOTION FOR NEW TRIAL WHICH REMOVED THE ELEMENT OF "FLIGHT" FROM THE CASE, AND SHOWED THAT WITNESS LIRA WAS UNRELIABLE.

As the court will note, present counsel did not participate in the trial of this case, but was retained on behalf of the defendant for all matters after indicated decision, including particularly the making and presentation of a motion for new trial.

That in connection with said motion, affidavits were submitted to the court from the defendant, and from two witnesses whose information struck at the vitals of the government's case against defendant as follows:

1. Mr. Perez pointed out that both he and his family had understood that the charge related to some alleged August, 1960 event (Aff. D. Perez, p. 3, line 23). For reasons entirely collateral to the charges here, he had terminated trading in Lira's store around August of 1960 (Aff. D. Perez, p. 3, line 16). In truth and in fact, however, he had traded with Lira in apparent friendliness from and after August of 1959, when the unlawful act is supposed to have been done, and for about one year thereafter (Aff. D. Perez, p. 2, line 19). On the one occasion when Lira said anything at

all which could have referred to the check matter, it was about eleven months later and Lira acknowledged that he had been mistaken (Aff. D. Perez, p. 2, line 28, et seq.)

2. That such facts are substantiated by two other young men, Mr. Frank Gomez and Mr. Louie Ocana, who were with Mr. Perez on numerous such shopping expeditions, which not only took place in friendly commercial transactions after the alleged incident, but which included an offer of hospitality from Lira over the Christmas season which to a man of Lira's apparent outlook, was the ultimate in friendliness and good will (Aff. L. Ocana, p. 3, lines 1-26, incl.).

The three affidavits offered in behalf of the defendant on the occasion of his motion for a new trial disclose, in counsel's view, the following:

1. That Mr. Perez shows that his failure to deny the evidence purporting to show that he avoided Lira's market after the August, 1959 incident was due to his own confusion as to the date of the charged event. The implication drawn therefrom by the Honorable trial court Judge, and which materially contributed to the decision thereof, is unwarranted by the true facts, even though it might have found some support in the apparent facts of trial. That in point of fact, Mr. Perez did trade with Lira on numerous occasions after the date of the incident alleged, and in apparent cordiality and in the presence of his associates, even having been offered the run of Lira's bedrooms and

alcohol five months later.

2. That this evidence not only destroys the so-called "flight" evidence, but destroys the credibility of Lira on all other points, including majorly his direct uncorroborated testimony that Perez cashed the check in question, notwithstanding the fact that Perez admittedly did not write the so-called forged endorsement, nor did he or anyone else make an endorsement of any type when Lira supposedly cashed it for him.

3. That defendant has reasonably explained why this evidence was unavailable at time of trial -- he in his mind thought of the charge as an August, 1960 charge, that therefore neither he nor his counsel were alerted to the existence of this valuable evidence. People have walked over oil fields for hundreds of years without anyone appreciating the significance of the lands. So it is with this evidence; no one realized that the apparently mundane facts in the affidavits were significant, the evidentiary content thereof was newly discovered.

III

THE TRIAL COURT COMMITTED SERIOUS ERROR IN NOT GRANTING THE MOTION FOR NEW TRIAL - THE OFFERED EVIDENCE, IF BELIEVED BY THE TRIER OF FACT, WOULD EXONERATE PEREZ, BY DESTROYING THE CIRCUMSTANTIAL EVIDENCE AGAINST HIM AND IMPEACHING THE SOLE MATERIAL WITNESS' DIRECT EVIDENCE.

The evidence offered by the defendant on the occasion of the motion is material, and goes far beyond impeachment or mere cumulative proof. It destroys the credibility of the sole material witness, Lira, against the defendant by showing that the truth was not in him when he said the defendant stopped coming into his store after August of 1959. We candidly admit that we would anticipate that the trier of fact would note and weigh this falsity when he considered other aspects of Lira's testimony, but such evidence goes far beyond that aspect. The court found flight; this evidence disproves flight.

The court judged a "consciousness of guilt"; do not the true facts reveal a "consciousness of innocence"? With the issues of the sole adverse direct evidence shown to be false on a material statement, and the circumstantial evidence removed from the case, does it not appear likely

that Daniel Roy Perez would be exonerated? The trial court, naturally, would have to hear and consider such evidence -- and accept or perhaps reject it. But this can only be done in a new trial. Rejection of the motion therefor has foreclosed the opportunity for Daniel Roy Perez to achieve vindication. Defendant did not and could not have testified as to having been in Lira's store after August of 1960, because in fact he had not been there after that time. There had been an unpleasant scene and he had wrecked his car. If the event had occurred in August, 1960, defendant would have had to bear up against the effect -- whatever it be, of this factor. Here, it is an unjust burden.

Non-production of this evidence at trial was based on the mistake of Perez, who is a minor. A mistake made by an adult defendant may be the basis for granting him a new trial. In Megia v. United States (16873, June 14, 1961, California), defendant was convicted of receiving, concealing, and transporting marijuana. After the end of his trial, defendant made a motion for a new trial and offered to produce a witness who was not produced at the trial because of a mistake in names and lack of information, who would provide defendant with a definite alibi. In reversing, this Court stated that there was nothing to show that the new witness was not a credible witness, and that, if he were produced, the entire case against the defendant might be different. Speaking from the standpoint of gamesmanship, both Meglia and Perez played poorly, but the question of legal guilt or innocence is not a sporting event, the innocent are entitled to their justifica-

tion even when they are slow of wit and clumsy of tongue.

The trial court was reminded by the government that Daniel Perez was a juvenile, being tried for juvenile delinquency, and the court was urged that a lower quantum of proof against him than the standard involved in criminal law generally is therefore a sufficient basis for proof. This point of view represents a curious and, we submit, an insidious perversion of an enactment designed for the benefit and protection of accused youths. The government suggested to the trial court that the Act, in essence, was designed to assist the prosecutor in sliding by on a weak case if the defendant is young enough.

A more rational analysis of the Act is found in Application of Johnson, 178 Fed. Supp. 155, where the Court stated at page 162:

> "Liberalization of criminal law, to permit proceedings to determine acts of juvenile delinquency rather than acts of crime, was not designed to diminish constitutional rights to fundamental fairness and justice."

At page 160, the court developed the thesis even further, when, quoting from In Re Poff, 135 Fed. Supp. 224, it stated:

> "Statutes concerning juveniles are devised to afford the juvenile protection 'in addition to those he already possesses under Federal

Constitution. . . . The legislative intent was to enlarge, not to diminish those protections.' "

As observed in United States v. Borders, 154 Fed. Supp. 214, 216, the very Act, itself, reflects the recognition of Congress that special consideration and protection is necessary to preserve the rights of the young. The court stated the propositions as follows:

"The Juvenile Delinquent Act was enacted with the realization that a youthful offender does not possess maturity of judgment and capacity to fully comprehend the nature or consequences of his offense."

If the philosophy of Congress in the Juvenile Act has validity, it would suggest that a greater degree of understanding should be given to the youthful accused person, not a lesser amount. Evidence which would, if accepted, probably exonerate Daniel Perez was not presented because he thought he was being tried for an event which allegedly occurred in August, 1960. If the event had in fact occurred as of such date, the evidence offered would have been meaningless. But because the charge goes in fact to August, 1959, true justice can only be done by a court that has heard it and assigned a weight or value to it.

A closely related point from the Federal Practice and Procedure text is stated as follows:

"A new trial, however, should be

granted where the newly discovered evidence, although impeaching, is so conclusive as to destroy the credibility of a material witness against the defendant. Thus a new trial should be granted if the court is satisfied that the testimony given by a material witness is false, that without it the judge or jury might have reached a different conclusion and that the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

4 Federal Practice and Procedure, Rules Edition 288. Citing:

United States v. Johnson, 149 Fed. 2d 31 (1945).

IV

THE COURT HAS ERRONEOUSLY FAILED TO GRANT THE MOTION FOR NEW TRIAL IN THE INTEREST OF JUSTICE, AS IT DOES NOT SERVE THE PURPOSE OF JUSTICE, OR OF THE ACT UNDER WHICH HE WAS TRIED, FOR THE JUVENILE DEFENDANT TO BE FOUND GUILTY BECAUSE HE FAILED TO COMPREHEND THE DATE ON WHICH IT WAS SAID THAT HE COMMITTED HIS CRIME.

The defendant is a youth of Mexican ancestry, not highly educated, of good moral fiber, and not familiar with the processes of law. He is on probation; if he were in fact guilty he could not have asked for more lenient treatment than he received. He realizes this fact when he asks for a new trial. He understands that if he gets a new trial and his new evidence does not result in his exoneration, he risks more substantial impairment of his freedom than has to date occurred.

The adjudication sought under the Juvenile Delinquent Act is in theory non-criminal, but, as pointed out by the court in In re Poff, 135 Fed. Supp. 224 at page 225:

"I cannot overlook the ultimate function of the Juvenile Court is to determine the guilt or innocence of the individual

in order to make an adjudication of whether he is delinquent."

It is also difficult to make the defendant and his parents understand that the defendant has not been found guilty of a crime. The defendant has not been incarcerated, or removed from the custody of his family. He and his parents are not seeking a lighter punishment for him. They are bound together in seeking to remove the judgment of guilty from his name.

The purpose of the Juvenile Delinquent Act under which the defendant was tried is to promote his welfare, to strengthen his family ties, to educate him, to protect him, to care for him.

"The fundamental philosophy of juvenile court law is that a delinquent child should be considered and treated not as a criminal but as a person requiring care, education, and protection. . . . (T)he primary function of juvenile courts, properly considered, is not conviction or punishment for crime but crime prevention and delinquency rehabilitation."

Thomas v. United States, 121 Fed. 2d 905.

(See also: In re Lewis, 11 N.Y. 217, 224 (1953), decision by the Honorable Justice Brennen, now

Justice of the Supreme Court of
the United States;

White v. Reid, 126 Fed. Supp. 867,
at page 870.)

It does not serve the purpose of this Act to let the defendant avoid the authority of the court, if the use of this authority is warranted. But neither does it serve the purpose of this Act, or the interest of justice under this Act, for the court to bind the juvenile and his family together with the stigma of untrue guilt.

At his trial, the defendant failed to appreciate the date on which it was charged that he committed crime. Because of this, the trial court was denied vital evidence which would have demonstrated his innocence. He has, instead, been found guilty on the unsubstantiated word of that locally noted drinker and purveyor of soft, medium and hard drink, Primo Lira. The newly revealed evidence would clearly affect the decision of the court in a material manner. In this appeal, the defendant does not seek to be judged innocent, although he is innocent. He seeks a new trial, in order that he may, with a full understanding of the charge that has been made against him, submit his evidence to the judgment of the court. He is confident that such court, with all the facts available, will dismiss the charge and vindicate him.

V

CONCLUSION

This appeal is made on behalf of defendant, Daniel Roy Perez from a judgment rendered against him and a finding that he did commit the offense of juvenile delinquency by uttering a check with a forged endorsement, knowing it to be false.

The factual background of the case shows that the evidence presented by the plaintiff, and chiefly relied upon by the court in making its decision, goes to two main points. The witness, Primo Lira identified the defendant as the person who presented the check to him for payment. The witness Mr. Primo Lira testified that the defendant never returned to the store after the time that the check was cashed by him. The conclusion reached on this point by the court was that the defendant's failure to appear was circumstantial evidence of his "form of flight". It was expressly stipulated that defendant's handwriting was not the same as that of the original, and only endorsement the check bore until Lira negotiated it with a beer truck driver.

Defendant's present counsel made a motion for a new trial, and a hearing was had by the trial court. The new trial was urged on the basis of newly discovered evidence and in the interest of justice.

The new evidence was in the form of sworn

affidavits by Daniel Perez, Frank Gomez, and Louie Ocana and are before this court. The affidavits disclose that the defendant was under a misapprehension that he was charged with passing the check in August of 1960, and not in August of 1959; that the defendant had traded many times with Mr. Lira after August of 1959; that he had been entertained by Mr. Lira in his home in December of 1959; that the only time defendant had ever been accused of cashing a "bad check" by Mr. Lira in all of these times was in the summer of 1960; and that Lira thereafter withdrew such accusation and stated that he had been mistaken.

The trial court refused to grant the motion for a new trial. The appellant respectfully contends that the court was in error in denying this motion.

The appellant respectfully submits that the court erred in not granting the motion on the basis of newly discovered evidence. The evidence offered by the defendant was material because it impeached the plaintiff's sole material witness, and overcame the circumstantial evidence of the defendant's flight. The evidence offered was likely to produce a different result at the trial. The evidence was newly discovered by the defendant in that he did not comprehend the date on which it was alleged he had done the acts which he was charged. In the light of the Act under which he was tried, and the role of the court in handling juveniles under this Act, the mistake of the defendant does not show such a lack of diligence as should prevent